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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-957

MRS. WINSTON CALDWELL, Administratrix and JAMES J. SHANLEY, *Petitioners*

v.

THE UNITED STATES, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR PETITIONERS IN REPLY

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The petition seeks review of a Court of Claims order which denied petitioners' motion for relief from judgment under Court of Claims Rule 152(b) which is drawn from F.R.C.P. Rule 60(b). (Pet. 1,2; Opp. 2).

Petitioners' 152(b) motion is based upon the facts that a previously withheld Government document reveals that the testimony of the Government's expert witness on a key issue of fact was not correct. It was untrue. (Pet. 2; Opp. 3).

The Government asserts that its misrepresentations should be disregarded because: "The Court of Claims, however, did not base its holding on the testimony of the Government witness." (Opp. 3). The Government presently contends that, instead, the court relied in large part on the fact that Caldwell used radio tube technology as a base from which he developed his electrical generator invention. (An electron tube which converts heat directly into electricity.) This argument ignores the findings of fact which establish that the apparatus disclosed in the patent is not the same as the radio tubes the inventor used for experimental work and demonstrations. (Finding 20, 202 Ct. Cl. 423, at 447). The conflict between the Opinion and the Findings of Fact stands out clearly, and the court most likely considered this inconsistency harmless error.

Nevertheless, the Government contends: (1) the court disregarded the testimony of the expert witness; (2) the court rendered its judgement in a complex patent case

without consideration of the trial record or findings of fact; and (3) therefore (as a result of this unique judicial procedure) "the evidence contained in the Atomic Energy Commission report would not necessarily have altered the court's holding." (Opp. 4).

If the Government scenario is a valid representation of the court's actions, abuse of judicial discretion is established ab initio. Petitioners believe that the court is more likely to have followed established procedures and relied upon the testimony of the Government expert. That testimony has now been discovered to be untrue, and petitioners seek to have the truth considered under the rule providing relief from judgment.

It may be true that the court denied petitioners' motion because consideration of the new evidence and the Government misrepresentations would not necessarily have altered the court's holding; but how can any litigant prove on a motion what will necessarily alter a court's opinion? The rules for relief from judgment do not require the impossible.

The standard applied by the Third and Fifth Circuits for granting 60(b) relief is whether the facts presented by the motion might have altered the judgment, if those facts had been available at the trial. Petitioners clearly meet the reasonable standard applied by the Circuit Courts of Appeals. The Court of Claims order denying relief from judgment is in conflict with the Circuits.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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